STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL BYRNE and MARGARET BYRNE[1]	:	DETERMINATION DTA NO. 813995
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1990, 1991 and 1992.	:	

Petitioners, Michael Byrne and Margaret Byrne, 23 Brooks Drive, Stony Point, New York 10980-1725, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1990, 1991 and 1992.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on August 13, 1996 at 1:15 P.M. All briefs were filed by December 30, 1996, which date began the six-month period for the issuance of this determination. Petitioners appeared by Alexander Gurevitch, Esq. and Alan S. Goldberger, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel).

ISSUE

Whether petitioner may properly subtract his Manhattan and Bronx Surface Transit Operating Authority pension income from his 1990, 1991 and 1992 Federal adjusted gross income pursuant to the subtraction modification provided in Tax Law § 612(c)(3)(i).

FINDINGS OF FACT

1. At all times relevant herein, petitioner Michael Byrne was a retired employee of the Manhattan and Bronx Surface Transit Operating Authority ("MABSTOA") and received an

[1]Pursuant to a stipulation entered into on May 3, 1996 amd May 15, 1996, respectively, by Alexander Gurevitch, Esq. and Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel), 120 similarly situated petitioners have agreed to be bound by the outcome of this determination. Likewise the Division of Taxation has agreed to be bound by this determination with respect to these 120 similarly situated petitioners.

annual pension from the MABSTOA pension plan.[2] There is no evidence in the record as to the source of funding of the MABSTOA pension plan. It is clear, however, that the MABSTOA pension plan was not part of either a New York State or municipal retirement system. It is also clear that the MABSTOA pension plan was not contributed to by a New York State or municipal retirement system, and pension payments made pursuant thereto were not paid by a New York State or municipal retirement system.[3]

2. MABSTOA, a public benefit corporation, was created in 1962 as a subsidiary of the New York City Transit Authority ("Transit Authority") to operate bus lines, formerly privately owned and operated, which had been acquired by the City of New York through condemnation proceedings (see, Public Authorities Law [PAL] § 1203-a). MABSTOA operates such bus lines through a lease agreement with the City and the Transit Authority (id.). As originally enacted, the statute provided that MABSTOA was to operate the bus lines "for a temporary period" until such lines are "sold or otherwise disposed of" (PAL § 1203-a[2]). In 1981, the Legislature amended the statute to provide that MABSTOA "shall continue until terminated by law" (see, L 1981, ch 1038; PAL § 1203-a[11]).

3. The directors of MABSTOA are the chairman and members of the Transit Authority (PAL § 1203-a[2]). Pursuant to PAL § 1201(1), the chairman and members of the Transit Authority are also the chairman and members of the Metropolitan Transportation Authority. Such persons are appointed by the Governor with the advice and consent of the Senate (PAL § 1263[1][a]).

4. With certain enumerated exceptions, MABSTOA possesses all powers vested in the Transit Authority including the power to sue and be sued; to have a seal; to acquire, hold and

---

[2]The dispute in this case involves the pension income of petitioner Michael Byrne. Margaret Byrne is a petitioner in this matter only because she and her husband, Michael Byrne, filed joint returns for the years in question. Accordingly, all references to "petitioner" in this determination shall refer to Michael Byrne unless otherwise indicated.

[3]The source of funding and the administration of the MABSTOA pension plan has been described in a decision of the former State Tax Commission (Matter of Noone, State Tax Commission, August 31, 1979) and in two advisory opinions issued by the Division of Taxation (Matter of Transit Supervisors Organization, October 13, 1992 [TSB-A-92(9)I]; Matter of Transport Workers Union of Greater New York, December 9, 1986 [TSB-A-86(18)I]).

use equipment; to acquire real property by purchase or condemnation; to receive grants of property, money or assistance from any person, government or agency; to make rules and regulations for its organization and management; to make rules for the regulation of its transit facilities; to retain counsel, engineers and private consultants for technical services; to use officers and employees of the city with its consent and to pay the agreed upon compensation for them; to make contracts, leases and conveyances including the power to contract with other transit facilities for combined fares and division of such fares; to surrender to the city property no longer required by it; to rent space and grant concessions on or in any of its facilities; to erect signs or to sell the right to do so; to exercise all requisite and necessary authority to manage, control and direct the maintenance and operation of the transit facilities transferred to it and to extend, modify or curtail its routes (giving notice to the New York City Board of Estimate at least 30 days prior to any change and upon request conducting a public hearing); to do all things necessary to carry out its purposes; and to submit copies of certain reports to the Mayor of the City of New York (see, PAL § 1204).

5. MABSTOA is specifically empowered to appoint officers and employees, assign powers and duties to them and fix their compensation. In addition, the PAL provides that:

> "[O]fficers and employees [of MABSTOA] shall not become, for any purpose, employees of the city or of the transit authority and shall not acquire civil service status or become members of the New York city employees' retirement system." (PAL § 1203-a[3][b].)

6. PAL § 1203-a(1) states that the status of officers and employees of MABSTOA is to be governed exclusively by the provisions of said section.

7. MABSTOA and any of its property, functions and activities are entitled to all of the privileges, immunities, tax exemptions and other exemptions of the Transit Authority (PAL § 1203-a[4]).

8. Pursuant to PAL § 1203-b, MABSTOA and the Transit Authority may each transfer to the other from time to time such available funds as they may jointly determine to be necessary or desirable.

9. The Comptroller of the City of New York is authorized to examine the books and records of MABSTOA related to its financial condition (PAL § 1208). MABSTOA is required to submit an annual report to the mayor, comptroller and board of estimate (PAL § 1213).

10. MABSTOA is authorized to use the officers, employees, agents, facilities and services of the city on the same terms and conditions as are applicable to the Transit Authority (PAL § 1203-a[5][b]).

11. Like MABSTOA, the New York City Transit Authority is a public benefit corporation. The purposes of the Transit Authority "are in all respects for the benefit of the people . . . and the authority shall be regarded as performing a governmental function." (PAL § 1202[2].) Unlike employees of MABSTOA, employees of the Transit Authority have civil service status (PAL § 1204[6]). Additionally, the Transit Authority is part of the New York City Employee Retirement System.

12. Petitioner timely filed a 1990 New York State Resident Income Tax Return (Form IT-201) on or before April 15, 1991. On his return, petitioner claimed a New York subtraction of $24,959.00 in respect of pension income paid to him in that amount during 1990 by the MABSTOA Pension Plan. In making such payments, the MABSTOA pension plan withheld State and local income taxes.

13. The Division of Taxation ("Division") reviewed petitioner's 1990 return pursuant to the audit program outlined in Finding of Fact "20". By a Statement of Proposed Audit Changes dated August 6, 1993, the Division advised petitioner that his MABSTOA pension did not qualify for exemption from New York income tax "as a NY State, local or municipal pension." The Division increased petitioner's reported New York adjusted gross income by the amount of the claimed exempt pension benefits, thereby resulting in an additional tax liability of $1,764.00, plus interest of $326.61, for the year 1990. On or about August 17, 1993 petitioner remitted payment in full of the amount asserted in the Statement of Proposed Audit Changes. Petitioner subsequently filed a claim for refund dated July 7, 1994 to recover this payment. Pursuant to a Notice of Disallowance dated December 27, 1994 the Division disallowed this

claim and advised petitioner that his MABSTOA pension "does not qualify for total exemption as a New York State, local or municipal pension."

14. Petitioner timely filed his 1991 New York State Resident Income Tax Return on or about April 10, 1992. On his return, petitioner claimed a New York subtraction of $24,840.00 for "NY Exempt Pensions" for pension income paid to petitioner by the MABSTOA Pension Plan. In making such payments, the MABSTOA pension plan withheld State and local income taxes.

15. The Division reviewed petitioner's 1991 return pursuant to the audit program outlined in Finding of Fact "20" and concluded that petitioner's MABSTOA pension benefits did not qualify for the claimed subtraction modification. By a Statement of Proposed Audit Changes dated July 5, 1994, the Division increased petitioner's reported New York adjusted gross income by the amount of the claimed exempt MABSTOA pension benefits, thereby resulting in an additional tax liability of $1,765.00, plus interest, for the year 1991.

16. On August 15, 1994, the Division issued to petitioner a Notice of Deficiency which asserted $1,765.00 in personal income tax due, plus interest, for the year 1991.

17. Petitioner timely filed his 1992 New York State Resident Income Tax Return on or about March 31, 1993. On his return, petitioner claimed a New York State subtraction of $24,840.00 for "Exempt Pensions" in respect of MABSTOA pension benefits paid to him in that amount during that year. In making such payments the MABSTOA pension plan withheld State and local income taxes.

18. The Division reviewed petitioner's 1992 return pursuant to the audit program outlined in Finding of Fact "20" and concluded that petitioner's MABSTOA pension benefits did not qualify for the claimed subtraction modification. By a Statement of Proposed Audit Changes dated April 18, 1995, the Division increased petitioner's reported New York adjusted gross income by the amount of the claimed exempt MABSTOA pension benefits, thereby resulting in an additional tax liability of $1,828.00, plus interest, for the year 1992.

19. On June 12, 1995, the Division issued to petitioner a Notice of Deficiency which asserted $1,828.00 in personal income tax due, plus interest, for the year 1992.

20. In 1992, the Division developed an audit program by which Division personnel were able to identify and manually review New York State income tax returns wherein taxpayers had subtracted their MABSTOA pension income from their Federal adjusted gross income. This program was developed in response to a 1992 request by the Office of the Comptroller to investigate the validity of such subtraction modifications. Upon investigation, the Division concluded that MABSTOA pensions did not qualify for the subtraction modification set forth in Tax Law § 612(c)(3)(i) and began to develop a computer program to identify tax returns in which MABSTOA pensioners had claimed the subtraction modification. In early 1993, Division personnel began to manually review tax returns for the year 1990 which had been selected by the program. (The year 1990 was the first for which the Division had the technological capability to conduct this program.) Beginning in August 1993, the Division issued the first of approximately 1,400 assessments for the tax year 1990. The Division subsequently applied the program to later tax years.

21. In 1994, a bill (S 6825/A 9671) was introduced in the Legislature to amend the Public Authorities Law to provide that, for purposes of Tax Law § 612(c)(3)(i), MABSTOA shall be deemed a subdivision of the State and its officers and employees shall, for the same purposes, be deemed officers and employees of a subdivision of the State. This bill was not enacted into law.

22. Petitioner did not claim that he qualified for the pension exclusion provided for in Tax Law § 612(c)(3-a) and presented no evidence that he had attained the age of 59½ at any time relevant herein.

23. The Division has at least one other audit program in existence that is based upon the Division's determination that the pension income does not qualify for the Tax Law § 612(c)(3)(i) subtraction modification because such pension income was not paid from a State

or municipal retirement system. The employer involved in the one identified audit program is the Long Island Railroad Company.

24. The Division submitted proposed findings of fact numbered "1" through "58". Proposed findings of fact "4", "7", "9", "11", "15", "17", "22", "23", "26", "28"-"35", "37"-"43" and "45"-"58" are accepted and have been incorporated, in substance, into the Findings of Fact herein. There were two proposed findings of fact numbered "23"; both are accepted. Proposed findings of fact "1"-"3", "5", "6", "8", "10", "12"-"14", "16", "18"-"21", "24"-"26", "36", and "44" are irrelevant to this determination and are therefore not presented as findings of fact. Proposed finding of fact "27" is not accepted because this proposed finding states the Division's position and is thus not in the nature of a Finding of Fact.

25. Petitioner submitted proposed findings of fact numbered "1" through "7". Petitioner's proposed findings of fact "2"-"4" and "6" are accepted and have been incorporated, in substance, into the Findings of Fact herein. Petitioner's proposed finding of fact "1" is in the nature of an ultimate finding of fact and is therefore rejected. Petitioner's proposed findings of fact "5" and "7" are unsupported by the evidentiary record and are therefore rejected.

CONCLUSIONS OF LAW

A. Tax Law § 612(a) defines New York adjusted gross income as Federal adjusted gross income with modifications as specified in that section. One such modification is set forth in Tax Law § 612(c)(3)(i) and provides that, in order to compute New York adjusted gross income, there shall be subtracted from Federal adjusted gross income:

> "Pensions to officers and employees of this state, its subdivisions and agencies, to the extent includible in gross income for federal income tax purposes . . . ."

B. The Division has promulgated regulations in connection with Tax Law § 612(c)(3)(i). 20 NYCRR former 116.3 (renumbered 112.3, effective January 13, 1992) provided, in relevant part:

> "Pensions and other benefits . . . included in Federal adjusted gross income and paid by a New York State or municipal retirement system to an officer or employee of New York State, its political subdivisions or agencies . . . shall be subtracted in computing New York adjusted gross income."

20 NYCRR 112.3(c)(1) was amended effective August 17, 1994, to provide as follows:

> "(i) Retirement benefits provided for in clause (a) . . . of this subparagraph which are included in Federal adjusted gross income, relate to services performed as public officers or public employees and all or a portion of which are actually contributed to (rather than merely being deemed contributed to) by New York State, its political subdivisions or agencies . . . shall be subtracted in computing New York adjusted gross income:
>
> (a) pensions and other retirement benefits . . . paid to a public officer or public employee . . . of New York State, its political subdivisions or agencies;
>
> * * *
>
> (iii) The provisions of this paragraph can best be illustrated by the following examples:
>
> * * *
>
> Example 5: A retired employee of a public benefit corporation receives a pension from a fund which was not contributed to by New York State, any of its political subdivisions or agencies . . . and which is taxed under the Internal Revenue Code as annuity income. Since such pension income is not exempt from New York State personal income tax under New York State law because such pension was not actually contributed to by New York State, any of its political subdivisions or agencies . . . the amount included in Federal adjusted gross income on account of this pension is not subtracted in determining such employee's New York adjusted gross income and is therefore included in such employee's New York adjusted gross income." (20 NYCRR 112.3[c][1].)

C. Tax Law § 612(c)(3)(i) is a codification of Article XVI, § 5 of the New York State Constitution which provides:

> "All salaries, wages and other compensation, except pensions, paid to officers and employees of the state and its subdivisions and agencies shall be subject to taxation."

D. The subtraction modification of Tax Law § 612(c)(3)(i) constitutes a statutory exemption from taxation. That is, New York State employee pension income, which is subject to Federal income taxation, would be subject to State income taxation but for this subtraction modification. Statutory exemptions are strictly construed against the taxpayer, since an exemption is not a matter of right, but is allowed only as a matter of legislative grace (see, Matter of Grace v. New York State Tax Commn, 37 NY2d 193, 196, 371 NYS2d 715, 719, lv denied 37 NY2d 708, 375 NYS2d 1027). Nevertheless, such interpretation "should not be so

narrow and literal as to defeat [the] settled purpose" of the exemption (id., at 196, 371 NYS2d at 718).

E. Bearing these construction axioms in mind, the first question to be addressed herein is whether MABSTOA employees are employees of the "state, its subdivisions and agencies" for purposes of the subtraction modification of Tax Law § 612(c)(3)(i). Since the statute itself offers no definition of this phrase, and since, clearly, reasonable minds may differ as to its precise meaning, it is appropriate to resort to "rules of construction and interpretation of the enactment with reference to the objectives to be achieved and the contextual spirit and purpose of its enactment" (1605 Book Center v. Tax Appeals Tribunal, 83 NY2d 240, 244, 609 NYS2d 144, 146).

F. As noted in PAL § 1203-a(2), MABSTOA is a "public benefit corporation." That term is defined in General Construction Law § 66(4) as:

> "[A] corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof."

G. The courts have long recognized that public benefit corporations, or public authorities, although created by the State and subject to dissolution by the State, are "independent and autonomous, deliberately designed to be able to function with a freedom and flexibility not permitted to an ordinary State board, department or commission" (Matter of Plumbing, Heating, Piping & Air Conditioning Contrs. Assn. v. New York State Thruway Auth., 5 NY2d 420, 423, 185 NYS2d 534, 536; see also, Grace & Co. v. State Univ. Constr. Fund, 44 NY2d 84, 404 NYS2d 316; Collins v. Manhattan & Bronx Surface Tr. Operating Auth., 62 NY2d 361, 477 NYS2d 91).

It has been observed that public authorities such as MABSTOA have "some of the characteristics of a private corporation and some of a state instrumentality" (1929 Opns Atty Gen 223, 224). Accordingly, under certain circumstances such entities have been treated as the State and under other circumstances they have not. Consistent with this observation, the Legislature has statutorily defined State agency or subdivision so as to include, under some

circumstances, MABSTOA specifically or, under other circumstances, public benefit corporations generally.

Specifically, pursuant to PAL § 1215, MABSTOA is included within the definition of "other political subdivision" for purposes of Worker's Compensation Law § 50(4) and is thus treated as the State with respect to securing compensation to its employees. PAL § 1215 also provides for the inclusion of MABSTOA within the definition of "any political subdivision" for purposes of Vehicle & Traffic Law former §§ 93-k and 94-ff (see, Vehicle & Traffic Law §§ 310 et seq. and 330 et seq.). MABSTOA was also specifically included, along with other governmental agencies and public authorities, within the definition of "covered organization" for purposes of the 1975 New York State Financial Emergency Act for the City of New York. MABSTOA and its employees were thus subject to the wage freeze provisions of this act (see, L 1975, chs 868-870; McKinney's Unconsolidated Laws § 5401 et seq.) Also, PAL § 1203-a(6) and § 1212 provide that the Notice of Claim requirements for "public corporations" set forth in General Municipal Law § 50-e are applicable to MABSTOA.

Additionally, MABSTOA falls within the definition of "government" or "public employer" and MABSTOA employees are "public employees" for purposes of New York's Taylor Law (Fair Employment Act, Civil Service Law § 201 et seq.). MABSTOA employees are thus subject to this law's provisions, including its prohibition against strikes and similar activities. MABSTOA is also an "agency" as defined in State Administrative Procedure Act § 102(1) and, jointly with the Transit Authority, has issued rules governing the conduct and safety of the public in the use of the facilities of the Transit Authority and MABSTOA (see, 20 NYCRR Part 1050). Further, the ethics provisions of Public Officers Law §§ 73 and 74 are applicable to public benefit corporations such as MABSTOA. It also appears that employees of MABSTOA are eligible to apply to the State Comptroller for membership in the State Employees' Retirement System (see, Retirement and Social Security Law § 31). Finally, MABSTOA, as a public benefit corporation, is also included within the definition of "agency" or "state agency" for other purposes, including, among others, State Finance Law § 53-a, the

State Environmental Quality Review Act (see, Environmental Conservation Law § 8-0105) and Executive Law § 310(11)(b), which involves the State's promotion of increased participation by minority- and women-owned business enterprises in State contracts.

H. In the absence of a statutory definition, such as in the matter at hand, the courts have made a "particularized inquiry . . . to determine whether -- for the specific purpose at issue -- the public benefit corporation should be treated like the State" (Clark-Fitzpatrick v. Long Island Rail Road, 70 NY2d 382, 387, 521 NYS2d 653, 655). Such an inquiry involves an analysis of the "nature of the instrumentality and the statute claimed to be applicable to it" (Grace & Co. v. State Univ. Constr. Fund, supra, 404 NYS2d at 318).

Consistent with this line of inquiry, a review of several decisions of the Court of Appeals addressing this issue reveals that the treatment accorded public benefit corporations depends upon the particular facts and circumstances. Specifically, the Court held that the State Thruway Authority, vested by the Public Authorities Law with specific and detailed power to construct and maintain a thruway system, was not subject to the public bidding requirements which are imposed on other State boards and departments pursuant to State Finance Law § 135 (see, Matter of Plumbing, Heating, & Piping & Air Conditioning Contrs. Assn. v. New York State Thruway Auth., supra). The Court also held that the State University Construction Fund, a public benefit corporation created to receive and administer monies available for construction of facilities of the State University, was not a State agency and thus not subject to a statute authorizing adjustments in contracts "awarded by the state" (see, Grace & Co. v. State Univ. Constr. Fund, supra). Additionally, the Court of Appeals held that MABSTOA was not a civil division of the State and that the Legislature did not violate the civil service provision of the State Constitution (Article V, § 6) when it expressly exempted MABSTOA from the requirements of the Civil Service Law (see, Collins v. Manhattan & Bronx Surface Tr. Operating Auth., supra).

A contrary result may be seen in Clark-Fitzpatrick v. Long Island Rail Road (supra). In that case, the Court held that, like the State, the Long Island Rail Road, a public benefit

subsidiary corporation of the Metropolitan Transportation Authority, was not subject to punitive damages in a civil action. The Court's holding was based on the "essential public function served by [the LIRR] in providing commuter transportation and the public source of much of its funding" (id., at 387, 521 NYS2d at 655).

I. For the reasons that follow, it is concluded that under the "particularized inquiry" line of analysis MABSTOA employees are properly considered employees of the "state, its subdivisions and agencies" for purposes of Tax Law § 612(c)(3)(i).

There can be little doubt that by its provision of public transportation MABSTOA performs a public service. Indeed, by definition a public benefit corporation such as MABSTOA (or the Transit Authority) "operate[s] a public improvement . . . , the profits from which inure to the benefit of [the State] or to the people" (General Construction Law § 66[4]). Moreover, the powers, functions and obligations of MABSTOA show a strong identity with the Transit Authority. Indeed, many of these powers and functions overlap (see, Tax Law § 1203-a[3], [6]). Additionally, Tax Law § 1203-b allows MABSTOA and the Transit Authority to freely transfer funds between the two as necessary. Moreover, Tax Law § 1203-a(4) grants to MABSTOA all "privileges, immunities, tax exemptions and other exemptions" enjoyed by the Transit Authority. Therefore, PAL § 1202(2)'s statement that the purposes of the Transit Authority "are in all respects for the benefit of the people . . . and the authority shall be regarded as performing a governmental function" is also appropriately applicable to the Transit Authority's subsidiary, MABSTOA. Additionally, as discussed in Conclusion of Law "G", MABSTOA is statutorily defined as a state agency for numerous purposes. Given these fact and circumstances, it must be concluded that MABSTOA has been imbued with a such a degree of identity with the State that it is properly considered as the State for purposes of Tax Law § 612(c)(3)(i).

Also supportive of according MABSTOA status as the State for purposes of the exemption in question is Rose v. Long Island Railroad Pension Plan (828 F2d 910). In that case, the Court of Appeals for the Second Circuit held that the Long Island Railroad pension

plan was a governmental plan for purposes of compliance with the Employee Retirement Income Security Act ("ERISA"). The court's holding was based on its determination that the Long Island Railroad, a public benefit subsidiary of the Metropolitan Transportation Authority, was an "agency" or "instrumentality" of the MTA, which was, in turn, a political subdivision of New York for purposes of compliance with ERISA. In determining whether the LIRR was an agency or instrumentality of the MTA, the court relied on Revenue Ruling 57-128, which lists six factors to be considered in making such a determination.[4]

The parallels to the instant case are clear. Like the LIRR, MABSTOA is a public benefit subsidiary corporation which provides public transportation. Also like the LIRR, MABSTOA is not a member of the State retirement system, but maintains its own retirement system. Both MABSTOA and the LIRR operate transportation facilities which had previously been operated by private entities. Further, application of the six factors set forth in Revenue Ruling 57-128 to MABSTOA indicates that MABSTOA is also a government agency or instrumentality. It would thus appear that, pursuant to Rose, the MABSTOA pension plan is a governmental plan for purposes of ERISA. This fact further identifies MABSTOA as part of the State and therefore weighs in favor of petitioner's position herein.

The particularized inquiry analysis also requires an analysis of the statute claimed to be applicable to the public authority or corporation (see, Matter of Grace & Co. v. State Univ. Constr. Fund, supra, 404 NYS2d at 318). In this case, the clear purpose of the exemption afforded by Tax Law § 612(c)(3)(i) is to provide a financial benefit to State retirees. If the pension exemption to retirees is considered a form of additional

---

[4]Revenue Ruling 57-128 lists the following factors for consideration: 1) whether the entity is used for a governmental purpose and performs a governmental function; 2) whether performance of its function is on behalf of one or more states or political subdivisions; 3) whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner; 4) whether control and supervision of the organization is vested in the public authority or authorities; 5) if express or implied statutory or other authority is necessary for the creation and/or use of such an instrumentality, and whether such authority exists; and 6) the degree of financial autonomy and the source of its operating expenses.

compensation for public service, then allowing MABSTOA retirees the benefit of the exemption is consistent with this purpose. Significantly, the exemption provision would impose no burden of any kind on MABSTOA, and thus would not interfere in any way with MABSTOA's public purpose. Nor would the exemption impede the "freedom and flexibility" which MABSTOA enjoys as a public authority. This factor distinguishes the instant matter from the cases discussed in Conclusion of Law "H" where the court found it appropriate to treat the public authority like a private entity. Each of those cases involved a law which would have imposed a burden upon a public authority or public corporation (see, Matter of Plumbing, Heating, & Piping & Air Conditioning Contrs. Assn. v. New York State Thruway Auth., supra; Grace & Co. v. State Univ. Constr. Fund, supra; Collins v. Manhattan & Bronx Surface Tr. Operating Auth., supra). In contrast, in this case, although the continued denial of the exemption to MABSTOA retirees would not interfere with MABSTOA's provision of public transportation, clearly allowing such retirees the benefit of the exemption as compensation for their public service is consistent with the public purpose of MABSTOA.

In support of its position that MABSTOA employees are not employees of the "state, its its subdivisions and agencies" for purposes of the exemption in question the Division relies heavily on Collins v. Manhattan & Bronx Surface Tr. Operating Auth. (supra). There, the Court of Appeals held that MABSTOA was not a "civil division" of the state for purposes of Article V, § 6 of the State Constitution, which concerns appointments and promotions in the civil service of "the State and all of the civil divisions thereof." The instant matter is distinguishable from Collins, for the question presented in this case is whether MABSTOA may be considered "the state and its subdivisions and agencies" for purposes of Article XVI, § 5. The difference in the language of these two constitutional provisions justifies the difference in the results of the two cases. The more expansive language of Article XVI, § 5 (i.e., "the state and its subdivisions and agencies" [emphasis added]) contemplates a broader definition of the instrumentalities to which the provision shall apply.

Furthermore, a determination that MABSTOA employees are employees of the State under Tax Law § 612(c)(3)(i) will not adversely affect the original purpose of making MABSTOA a subsidiary of the Transit Authority, which was to retain a separate identity for purposes of later sale or disposal (see, PAL § 1203-a[2]; Collins v. MABSTOA, 116 Misc 2d 6, 453 NYS2d 289, 294). Whether this original purpose is still in effect is somewhat questionable, however, given the passage of time since MABSTOA's creation and the passage of PAL § 1203-a(11).

J. The second criterion necessary to qualify for the subtraction modification under the regulations is that pensions must be paid by a State or municipal retirement system (20 NYCRR former 116.3) or actually contributed to by the State (20 NYCRR 112.3). The MABSTOA pension fails to meet this criterion. This failure is sufficient, by itself, to disqualify petitioner from entitlement to the benefit of Tax Law § 612(c)(3)(i) unless it is shown that the regulation is invalid.

The Division of Tax Appeals has authority to rule on the validity of regulations promulgated by the Division of Taxation (Tax Law § 2006[7]). Generally, such regulations are properly upheld unless shown to be irrational and inconsistent with the statute (Matter of Slattery Assoc. v. Tully, 79 AD2d 761, 434 NYS2d 788) or erroneous (Matter of Koner v. Procaccino, 39 NY2d 258, 383 NYS2d 295). On the other hand, the Division's regulations "are not entitled to such deference when, as here, the issue is one of pure statutory construction" (Debevoise & Plimpton v. New York State Department of Taxation & Fin., 80 NY2d 657, 664, 593 NYS2d 974, 977), for the Division has "no authority to create a rule out of harmony with the statute" (Matter of Jones v. Berman, 37 NY2d 42, 53, 371 NYS2d 422, 429). Accordingly, the Division "may not promulgate a regulation that adds a requirement that does not exist under the statute" (Emunim v. Town of Fallsburg, 78 NY2d 194, 204, 573 NYS2d 43, 48).

K. In this case the language of Tax Law § 612(c)(3)(i) provides for a subtraction modification for "pensions to officers and employees of this state . . . ." The statute includes no qualifying language surrounding the word "pensions" and thus makes no reference to the

requirement contained in the regulations regarding the source of the pension income. The Division asserts that by exempting pensions "paid to" State officers and employees Article XVI, § 5 (and Tax Law § 612[c][3][i]) implicitly requires that such pensions be "paid by" the State or a municipality from a State or municipal retirement system. This contention is rejected. "The failure of a legislative body to include a matter within the scope of an act may be construed as an indication that its exclusion was intended" (City of New York v. New York Telephone Co., 108 AD2d 372, 489 NYS2d 474, 476). In this case, the omission of qualifying language is properly construed as intentional. Obviously, the Legislature could have imposed the requirements contained in the regulations, but did not do so. Moreover, the arguments advanced by the Division in support of its position that the "State pension" requirement is implicitly contained in the statute are unconvincing.

Specifically, in support of its contention that the statute implicitly requires that pensions must be paid from a state-funded retirement system in order to escape taxation, the Division cites the proceedings of the 1967 New York Constitutional Convention. During a debate over a proposed amendment to Article XVI, § 5 at least one of the delegates indicated that the intent of this provision when adopted at the 1938 Constitutional Convention was to eliminate any doubt as to right of the State to subject the salaries of State officials to income tax.[5] The same delegate further stated that the intent of this provision was also to exempt pensions from income tax, with pensions described in the debate as "that portion of the retirement allowance which is represented by the moneys contributed by the State or the municipality." One rationale for this exemption as expressed by this delegate is that the State should not tax its own moneys (i.e., its pension contributions). The record of the 1967 Constitutional Convention also indicates that the exemption is in the nature of a fringe benefit for State employees, and that all employees who are members of a state or municipal retirement system, including "authority employees", are eligible for this benefit. (See, 2 NY Constitutional Convention Record, pp. 476-481.)

---

[5]This statement of the intent of Article XVI, § 5 is confirmed by the record of the 1938 Constitutional Convention (see, Constitutional Convention of 1938, Ch XX, "Constitutional Aspects of the Taxation of Salaries of Constitutional Officers", pp. 466-479).

The record of the 1967 Constitutional Convention thus reveals a construction of Article XVI, § 5 which indicates that pensions eligible for exemption from State income tax must be paid from the State Retirement System. This circumstance is properly given little weight herein for two reasons. First, the amendment in question became part of the State constitution following the 1938 constitutional convention. Statements made by a delegate to the 1967 convention regarding the proper construction of this amendment affords little insight into the intent of the drafters of this amendment in 1938. Second, while the record of the 1967 proceedings indicates that the exemption applies to state-funded pensions, it also indicates that employees of authorities are eligible for the exemption. Clearly, the debate did not address the question of whether authority employees who are not members of a state-funded retirement system are eligible for the pension exemption.

The Division also asserted that Tax Law 612(c)(3)(i) was a codification of not only Article XVI, § 5 of the State constitution, but also Article V, § 7 which states:

> "After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

The Division cited several advisory opinions in support of this position, each of which made this unsupported assertion (see, Transport Workers Union of Greater New York, TSB-A-86[18]I, December 9, 1986; Patrick J. Falco, TSB-H-81-[14]-I, March 18, 1981; Wilbur W. Stillwagon, TSB-H-81-[16]-I, March 18, 1981; Edward Yule, Jr., TSB-H-81-[15]-I, March 18, 1981).

This contention is rejected. While the subtraction modification in dispute is obviously grounded in Article XVI, § 5, there is little support for the proposition that the meaning and intent of Tax Law § 612(c)(3)(i) may be discerned by reference to Article V, § 7.

The purpose of Article V, § 7 was to insure that pension and retirement benefits would not be subject to unilateral action by the Legislature or the employer (see, Village of Fairport v. Newman, 90 AD2d 293, 457 NYS2d 145, 148). Since such rights are contractual, the parties (i.e., members and employers) may negotiate changes in benefits (id.). In contrast, the

exemption of pension income provided for in Article XVI, § 5 is clearly not part of the contractual relationship between retirement system members and the State and is not a subject for negotiation between these parties. The exemption of pension income is thus not a benefit of membership in a State retirement system within the meaning of the constitutional provision. It is concluded, therefore, that Article V, § 7 is unrelated to the constitutional or statutory pension exemption, and thus in no way supports the Division's interpretation of Tax Law § 612(c)(3)(i).

The Division also cited a decision of the former State Tax Commission, Matter of Noone (August 31, 1979), in support of its position. Noone simply noted that a MABSTOA pension was not payable by the State or municipal retirement system and, therefore, did not qualify for the pension exemption under the regulations. Since former State Tax Commission decisions are not precedential (see, Matter of Racal Corp., Tax Appeals Tribunal, May 13, 1993) and since this determination concludes that the regulations are invalid to the extent that they require payments from a State or municipal retirement system in order to qualify for exemption, the significance of Noone is severely limited.

The Division also contended that to interpret the statutory language as not requiring that the pension income be paid by a State or municipal retirement system would lead to absurd results. The Division argued that such an interpretation would require, under some circumstances, exemption for pensions related to services performed as private employees. This contention is clearly in error. This determination's interpretation of Tax Law § 612(c)(3)(i) would not lead to such an absurd result. Obviously, pension benefits must relate to services performed as public officers or public employees in order to qualify for the pension income exemption (see, 20 NYCRR 112.3[c][1][i]).

Pursuant to the foregoing discussion, it is concluded that the Division's regulations at 20 NYCRR 112.3(c)(1)(i) and former 116.3 are invalid to the extent that such regulations may be interpreted as precluding the exemption of pension income pursuant to Tax Law § 612(c)(3)(i) unless such pension benefits are paid from a New York State or municipal retirement system. As discussed herein, such a requirement does not exist under the statute.

L. It is noted that petitioner also asserted that the Division's interpretation of Tax Law § 612(c)(3)(i) as applied in this case and as embodied in the regulations promulgated thereunder was in violation of his constitutional rights of due process and equal protection. In light of Conclusions of Law "I" and "K", this assertion is moot.

M. In his reply brief, petitioner repeated his assertion as to the unconstitutionality of the Division's application of the law in this case and asserted that, under such circumstances, the Division should be required to provide retrospective relief to all MABSTOA retirees who paid State income tax on their MABSTOA pensions regardless of whether such individuals timely filed refund claims or petitions. This contention is also moot in light of the conclusions reached herein. It should be noted, however, that even if this determination had ruled the relevant statute and regulations unconstitutional as applied, there may be no recovery via refund or cancellation of a deficiency absent a timely filed refund claim or petition (see, Matter of Burkhardt, Tax Appeals Tribunal, January 9, 1997).

N. The petition of Michael Byrne and Margaret Byrne is granted. Accordingly, Petitioners' refund claim for the year 1990 is granted and the notices of deficiency dated August 25, 1994 and June 12, 1995 are cancelled.

DATED: Troy, New York
Jun 19, 1997

Timothy J. Alston
ADMINISTRATIVE LAW JUDGE